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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 283

JOSEPH LASAGNA,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF AND FOR THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary and short statement of matter involved	1
Jurisdictional statement	3
Questions presented	4
Reasons relied on for allowance of writ	5
Prayer for writ	6
Brief in support of petition	8
Opinion of courts below	8
Grounds on which jurisdiction of Supreme Court of the United States is invoked	8
Statement of the case	8
Specifications of errors	18
Argument	19
Point I—The Supreme Court of Utah erred in vacating the jury's verdict and dismissing petitioner's cause	19
Point II—The Supreme Court of Utah erred in holding as matter of law that the evidence was insufficient to require submission of the issue of respondents' negligence to the jury	22
Point III. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law	26
Point IV. The Supreme Court of Utah wholly misconceived the legal principle upon which petitioner's action was founded and improperly and erroneously construed the facts by holding that petitioner failed to make a case for the jury for the following reasons:	

Page

(a) Proper and adequate safety rules and regulations had been adopted and promulgated 34
(b) Respondents' blue flag rule had not been abandoned or waived.. 36
(c) The Navy switch lock rule had not been abandoned or waived..... 36
(d) Respondents were saved from liability by their own ignorance.... 39
(e) The car inspectors' lookout practice discharged respondents' admitted duty to promulgate and enforce safety rules and its violation by petitioner and Olsen furnished respondents a complete shield against liability..... 04
Conclusion 41

Table of Cases Cited

Albert Miller & Co. v. *Wilkins*, 209 Fed. 582..... 23
Bailey v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062..... 2, 21, 22
Blair v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. 545, 89 L. Ed. 490..... 2
Cogswell v. *Chicago & Eastern Ill. R. R. Co.*, 328 U. S. 820, 66 Sup. Ct. 1122, 90 L. Ed. 945..... 3
Ehalt v. *McCarthy*, 104 Utah 110, 138 P. (2d) 639... 6
Ellis v. *Union Pacific R. R. Co.*, 67 Sup. Ct. 598..... 2, 22
Grand Trunk Western R. R. Co. v. *Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838..... 29
Harding v. *Railway Transfer Co.*, 83 N. W. 395..... 23
Illinois C. R. Co. v. *Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249..... 30
Jacob v. *New York City*, 315 U. S. 752, 86 L. Ed. 1166, 62 Sup. Ct. 854..... 21
Jesionowsky v. *Boston & Maine R. R.*, 67 Sup. Ct. 401..... 3
Keeton v. *Thompson*, 326 U. S. 689, 66 Sup. Ct. 135, 90 L. Ed. 57..... 3

Page

Lavender v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740, 90 L. Ed. 692 ..... 2, 3, 21, 28
Merrill v. *Oregon Short Line R. Co.*, 29 Utah 264, 81 P. 85, 110 Am. St. Rep. 695 32
O. & M. Ry. Co. v. *Wangelin*, 43 Ill. App. 324 39
Pauly v. *McCarthy*, 166 P. (2d) 501, 67 Sup. Ct. 102 ..... 2, 6
Porter v. *Terminal R. Assn. of St. Louis*, 327 Ill. App. 645, 65 N. E. 2d 31 23
Reed v. *Davis*, 251 N. Y. S. 704 24
Ryan v. *Twin City Wholesale Grocer Co.*, 210 Minn. 21, 297 N. W. 705 23
Steller v. *C. & N. W. Ry. Co.*, 46 Wis. 497, 1 N. W. 112, 49 Wis. 609, 6 N. W. 303 23
Spokane & Inland Empire R. R. Co. v. *Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683 30
Tennant v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 Sup. Ct. 409, 88 L. Ed. 520 ..... 2, 21, 28
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 323 U. S. 574, 65 Sup. Ct. 421, 89 L. Ed. 465 ..... 2, 21, 29, 30
Union Pacific R. Co. v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 Sup. Ct. 318 30
Wegman v. *Great Northern Ry. Co.*, 189 Minn. 325, 249 N. W. 422 23

STATUTES CITED

Judicial Code, section 237(b) section 1, Chapter 229, 43 Statutes 937, Title 28 U. S. C. A., Sec. 344 ..... 3, 8
45 U. S. C. A., sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404 3

TEXTS CITED

39 C. J. 476 36
3 Labatt's Master & Servant, 2nd Ed.:
Sec. 1119, p. 2961 36
Sec. 1120, p. 2962 38
Sec. 1125, p. 2982 24
2 Shearman & Redfield on Negligence, Rev. Ed.:
Sections 193 and 202 23
Section 214 33

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 283

JOSEPH LASAGNA,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF AND FOR THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petition of Joseph Lasagna respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah denied and took from petitioner the right of trial by jury guaranteed him by the Constitution in an action arising under the Federal Employers' Liability Act, where the evidence clearly demon-

strated that respondent failed to exercise reasonable care in furnishing petitioner, their employee, with a safe place to work, and that such failure proximately contributed to the cause of his injuries and said Court, contrary to the will of Congress as expressed in the Federal Employers' Liability Act and to the holdings of this Court as expressed in its controlling decisions construing the Act, allowed, permitted and sanctioned the recrudescence of the outlawed defense of contributory negligence.

The trial court submitted the issues of the case to a jury which returned a unanimous verdict awarding petitioner substantial damages. The trial Judge overruled respondents' motion for a new trial.

The Supreme Court of Utah vacated the verdict, reversed the judgment and ordered petitioner's case dismissed, the court being of the opinion that there was no issue of negligence to submit to the jury as in its judgment the evidence conclusively established that respondents were not negligent as charged, and did establish that petitioner's own negligence and lack of care was the sole proximate cause of his injuries.

Petitioner contends that in reaching this result the Utah Court ruled contrary to the principles of law announced by this Court in *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062; *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598; *Pauly* v. *McCarthy, et al.*, 67 S. Ct. 102 reversing 166 P. (2d) 501; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Laven-*

der v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Keeton, Administratrix of Keeton, dec'd* v. *Guy A. Thompson, Trustee in Bankruptcy for Mo. Pac. R. R. Co.,* 326 U. S. 689, 66 S. Ct. 135, 90 L. Ed. 57; *Cogswell* v. *Chicago & Eastern Ill. R. R. Co.,* 328 U. S. 820, 66 S. Ct. 1122; 90 L. Ed. 945; *Jesionowsky* v. *Boston & M. R. R.,* 67 S. Ct. 401.

In the above cases this Court definitely declared that questions of fact such as resolved by the Utah Court in these proceedings, as matters of law, must be submitted to the jury, and that the refusal of trial courts to submit such issues to juries and that the vacating of supported verdicts is nothing short of an abdication of the court's sworn duty to guard and protect the rights of litigants suing under the Federal Employers' Liability Act to jury trial; that to thus deprive railroad workers of the benefits of this right is to take from them a goodly portion of the relief afforded by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A. Section 344.

(b) The Statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on February 28, 1947. It is set forth at (R. 252, 266), is not yet reported in the Utah Reports, but appears at 177 P. (2d) 734. The petition for rehearing was denied May 20, 1947 (R. 267). This petition for certiorari was filed August 20, 1947.

Questions Presented

The question presented is whether the Supreme Court of Utah properly applied the United States Statutes commonly called the Federal Employers' Liability Act, or whether the application made by it is inconsistent and in conflict with applicable decisions of the Supreme Court of the United States. The Utah Court in this case which arose under said Act held that petitioner was not entitled to have the issues of his cause submitted to a jury because as matter of law: (a) Respondents were not guilty of failure to use reasonable care in furnishing their employee with a safe place to work; when, according to the evidence, the railroad yards wherein petitioner was required to work were extremely dangerous and hazardous due to the fact that many varied, complex and dangerous switching operations were carried on within said yards by relatively inexperienced crews, and that car inspectors, including petitioner, were required to work in said yards while said switching operations were being performed without the protection of blue flags, blue lights, switch locks or other safety devices, or proper safety rules, regulations or practices. (b) There was no duty on respondents' part to exercise reasonable or any care to procure knowledge and advice with respect to the methods and practices followed in the yards where their servant was required to work. (c) Respondents were under no obligation to determine whether their servant was protected while engaged in the performance of his duties by safety rules, regulations, practices or devices. (d) Respondent's ignorance of the conditions, methods and practices existing and followed in the yards where their servant was required to work, fully insulated them against liability for the injuries sustained by him. (e) The safety rules, regulations and methods promulgated

by respondents as protection for car repairmen and inspectors while working in their own yards provided respondents a complete defense against petitioner's cause even though such safety rules were never promulgated, enforced or respected in the yards where he was required to work. (f) Petitioner's failure to preserve his own safety by appropriate response to the common and fundamental instinct of self-preservation was the sole cause of his injuries. (g) The protection afforded petitioner under the custom followed by the inspectors in their efforts to protect against the dangers and hazards of their work as enhanced by the lack of safety rules, regulations or devices to wit: "every man must look out for himself" was greater than the safety afforded by defendants' blue flag rule or the Navy switch lock rule, and therefore, constituted a complete discharge of the admitted duty to promulgate and enforce proper safety rules and provide adequate safety devices. (h) That petitioner's conduct in failing to look out for himself was the sole proximate cause of his injuries when, as matter of fact, his conduct, was nothing more than contributory negligence.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. It has set aside a verdict by the jury supported by substantial evidence and reversed the judgment based thereon and ordered the dismissal of petitioner's cause in a case involving the rights of an employee of an interstate carrier by railroad arising under and protected by the Federal Employers' Liability Act. By its decision, the Utah Court has usurped the functions of the jury contrary to the repeated admonitions of this Court. It has

arbitrarily set aside a finding of the jury, based upon substantial evidence, to the effect that respondents were negligent as charged, and that their negligence contributed to the cause of petitioner's injury, and, has allowed, sanctioned, and permitted the outlawed defense of contributory negligence to defeat recovery in an action arising under the Act. The Utah Court has thus wrongfully deprived petitioner of his constitutional guarantee of trial by jury.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act in Utah, and specifically to determine whether or not the Utah Supreme Court will be permitted to continue to construe and apply the Federal Employers' Liability Act in a manner contrary to the decisions of the United States Supreme Court and other Federal Courts construing it. See *Ehalt* v. *McCarthy, et al.* (1943), 104 Utah 110, 138 P. (2d) 639; *Pauly* v. *McCarthy, et al.*, 166 P. (2d) 501, reversed by this Court in 67 S. Ct. 102, and the decision of the Utah Court herein.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled *Joseph Lasagna, Respondent,* v. *Wilson McCarthy and Henry Swan,* Trustees of and for The Denver & Rio Grande Western Railroad Company, a Corporation, Appellants, No. 6979, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court reversed and the judgment of the Third Judicial District Court,

in and for Salt Lake County, State of Utah, reinstated herein.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The verdict of the jury in petitioner's favor and the judgment of the Court pursuant thereto were rendered on the 17th day of April, 1946 (R. 23, 24). The Opinion of the Supreme Court of Utah is set forth at R. 252 to 266, is not yet reported in the Utah Reports but appears at 177 P. (2d) 734.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on the 28th day of February, 1947 (R. 266). Petition for Rehearing was denied on the 20th day of May, 1947 (R. 267). Petition for Writ of Certiorari was filed on August 20, 1947. The judgment of the Supreme Court of Utah is based upon its application of the United States Statute commonly called the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A., Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A., Sec. 350.

Statement of the Case

Petitioner, a first-class carman, thirty-five years of age, who had been employed by the respondents and The Denver and Rio Grande Western Railroad Company for seventeen years (R. 142), was injured while engaged in the performance of his duties under his employment as a car in-

spector in the railroad yards at the United States Naval Supply Depot, Clearfield, Utah, at about 3:00 o'clock P. M. on the 25th day of July, 1944 (R. 159).

Upon trial of petitioner's action brought under the Federal Employers' Liability Act the jury returned a verdict assessing total damages in the sum of $125,275.26 but deducted $85,000.00 for contributory negligence, making a net verdict for petitioner of $40,275.26 (R. 23).

Petitioner charged respondents, his employers, with negligently and carelessly failing to use and exercise reasonable care in furnishing him with a safe place to work, in that they commanded him to perform the duties of his employment as car inspector in yards where the inspectors were not protected by safety rules, regulations or devices; that the absence and lack of safety rules, regulations and devices made the place of work dangerous, hazardous and unsafe, and that as a result of such dangerous and hazardous condition petitioner was caused to and did suffer the grievous and permanent injury complained of by him.

By answer, respondents admitted that they rested under the duty of exercising reasonable care to furnish petitioner a safe place to work, admitted that they rested under a duty to establish, promulgate and exercise due care for the enforcement of reasonable rules and regulations, including a requirement that whenever repairmen, inspectors or other workmen were at work in, on, under or about an engine, car or train, a signal giving notice of the fact that a man or men were thus at work be placed in a position where it could be seen and give due warning of such fact to persons engaged in a switching or other movement of cars or engines to the end that no movement of an engine, car or train in, on, under or about which an employee might be working would occur and any personal injury to such employee would be avoided (R. 11).

Petitioner, while engaged in the act of inspecting a

coupler, was permanently injured and crippled when a switching crew kicked a cut of cars from the lead in onto the track where the car under inspection was standing (R. 158-159).

On the day of his injury, petitioner, pursuant to the directions of his boss Wikane, respondents' repair track foreman and assistant to the general car foreman (R. 205, 206, and 143), left his employment at Roper and proceeded to the Naval Depot at Clearfield to relieve the regular inspector Roseberry. He went directly to the shops and when Olsen, the Navy car inspector, arrived he and petitioner proceeded down along Track No. 9 inspecting the various cars on the track. Olsen was on the east side and petitioner on the west. They started at the northerly end of the cut and worked toward the south (R. 158). When they reached the third or fourth car petitioner was about fifteen feet ahead of Olsen and Olsen called him back, requesting him to look at a coupler which had been welded (R. 159). Petitioner turned around, looked to see if there were any engines in the yard, did not hear or see any, and proceeded to examine the coupler. He stated: "I had hold of both grab irons. I can remember I was going to step to go through, to see what he meant about the welding. The next thing I knew something hit me hard on the shoulder, and knocked me between the track. Then, from then on I was plenty dizzy. I was trying to keep the car truck from rolling me under, so it would finish me, on top of me." (R. 159).

In describing the occurrence resulting in injury to petitioner, Olsen testified:

> "A. We got down to about the fifth car; we were on the south end of the fifth car. I was on the east side of the car and he was on the west, and I noticed what I thought was a cracked coupler, in other words, a drawbar, so I started to look at it, but I called to Joe, because he has had more experience than I have: 'I think this

coupler is cracked. It has been welded a little,' and I asked him to look at it. He in turn looked at it, and I looked at it. We were in a sitting position, both holding on to a grab iron on the end of the car. I had my right hand on the grab iron, on the east side of the car, and he was on the west, when those cars hit this string of cars. I am not positive whether it was one or two cars. Some say it was two and some say it was one. I think two, but I am not positive of that. They knocked those cars down into us, and it dragged us both under the car. Joe went under and it cut his leg off. It pulled me under but I was lucky enough to get out." (R. 66).

"Q. Now, at the time that those two cars, as you have stated, came down into the string of cars that you were inspecting, did you have any blue flag up?
A. No sir.
Q. Did you have any locks for switches?
A. No sir.
Q. Anything of that kind?
A. No sir." (R. 68).

It appears from the record that the car inspectors in the railroad yards at Clearfield were required to work without the protection of safety rules, regulations or devices. While the car inspectors were engaged in their work, many varied, complex and dangerous switching operations were being performed in these yards by relatively inexperienced switch crews (R. 194) and the work of a car inspector was therefore fraught with great hazard.

In speaking of this, Navy Inspector Olsen stated: "Pardon me for a minute; but even the jury or anyone else that had to work in that yard out there would have had grey hair in a year" (R. 70).

From January 1, 1944, until July 25, 1944, the day petitioner was injured, respondents were hauling an average of four trains in and four trains out each day and each train contained from five to forty-five cars (R. 35-36). It thus

appears that respondents were handling an average of approximately 6000 cars every thirty days. The Union Pacific was handling practically the same number (R. 217-218). The operations pertaining to the switching and handling of these 12,000 cars a month in the yards were performed by relatively green and inexperienced crews (R. 194). During this time the Navy was using about nine Diesel switch engines in the yards and during the shift when petitioner was injured five or six of these Diesels were being used in the switching and handling of cars on the twelve tracks (R. 86, 87).

Prior to the date of his injury petitioner had, upon special direction, served respondents as a car inspector in the Naval Depot yards from March 13th to April 11th, 1944, and also on July 20th.

Petitioner's testimony clearly reveals the nature of his employment, the lack of safety rules, regulations and devices, and the causal relationship between the dangers of his work place and his injury. He was requested by Wikane, the assistant car foreman, to leave his usual employment in respondents' yards at Roper, Utah, and proceed to the Clearfield Naval Depot and relieve the regular car inspector Roseberry (R. 143). Wikane instructed: "You can get in there by going down to the agent at our station in Clearfield and ask him to help you get in," and "after you get in there—I have never been in there—there is a U. P. man and a Navy man working there. Ask them what there is to do" (R. 144). Responsive to his orders, he proceeded to the Naval Depot, was finally admitted, located the inspectors, introduced himself and asked them what his duties were (R. 145). Olsen, the Navy inspector, accompanied him into the yards where they commenced their labors. With reference to the work practice, petitioner was advised and instructed:

> "Q. When you went down was anything said about the use of anything to protect yourselves?

A. No, except when we started on the first car, I asked them why they did not use a blue flag. I noticed they started inspecting without a blue flag. I asked them why, because it had been my practice to use a blue flag all the time; and I don't remember which one it was, whether it was Olsen or Layton said: *'We don't use blue flags here. They would not be any good if we did have them.'*

So then I asked them, 'What other kind of protection have you got here?'

He said: *'We just have to look out for ourselves, like we always have done.'* " (R. 146).

It was definitely and positively established by the evidence that the admitted duty of promulgating and exercising due care to enforce adequate safety rules was violated and that the violation of this duty proximately contributed to the cause of petitioner's injury.

Herein of Blue Flags

Blue flags were never used in these yards during the whole course of petitioner's employment. Petitioner testified positively that blue flags were never used in the yards at any time while he worked there (R. 155, 158, 166). Navy Inspector Olsen likewise testified (R. 63, 64, 68, 72), as did Navy Inspector Bingham (R. 128). Roseberry, respondents' witness, testified that during a period of about six or eight weeks after he started working in the yards (July 7, 1943, R. 183), he tried to use blue flags but that the switch crews disregarded the blue flags and refused to respect or pay any attention to them; that after the second one had been run over he abandoned and discontinued their use altogether (R. 187, 189, 193, 196).

Kennedy, the Navy relief inspector, testified that he used blue flags as protection while engaged in his work (R. 202). This testimony, however, is in conflict with the testimony of Olsen and Bingham.

Olsen testified that he had never used or observed any other inspector using blue flags in the yards at Clearfield between January of 1944 and the date when petitioner was injured (R. 63). He testified that he had worked with Kennedy while Kennedy was inspecting cars in the yards (R. 74, 75).

Bingham testified that he had never used blue flags nor seen them used there prior to petitioner's injury (R. 128).

It is interesting to note that Kennedy was sent to the yards on special assignment to relieve Roseberry. Roseberry never used a blue flag during the period of Kennedy's employment in the yards. It is rather peculiar that Kennedy would adopt a practice contrary to that followed by the man he relieved.

The Court permitted respondents to take refuge behind the shield of their own ignorance concerning the practices followed and existing in the yard where they sent their servant to work. It appears, however, that respondents were never sufficiently concerned about the practices and methods being followed in the yards at Clearfield to make an inquiry, and that their regular car inspector Roseberry, who knew as much of the practices and methods being followed as any one and who was well aware of the lack and absence of safety rules and devices, and who knew that respondents' blue flag rule had never been respected, followed or enforced in the yards, was never sufficiently interested to report these conditions to anyone connected with the operation of respondents' railroad.

The enforcement of the blue flag rule would undoubtedly have saved petitioner from injury. In recognition of this fact, blue flags were provided in considerable abundance after the accident. Olsen testified "After the accident there were lots of blue flags around the yards" (R. 73).

Herein of Switch Locks

Switch locks were never provided or used during the whole period of petitioner's employment in the yards at Clearfield. Petitioner so testified (R. 164). Olsen testified that switch locks were never used in the yard until after the accident (R. 64, 68, 91, 95). Bingham's testimony is to the same effect (R. 128). Kennedy, the relief inspector, never used switch locks while he was employed as a car inspector in the yards.

Roseberry testified that when it became apparent to him that the switch crews would not respect the blue flag, he commenced locking the switches (R. 187). This testimony is in conflict with the testimony of the Navy inspectors who worked with him (R. 75, 121), and who positively testified that they had never seen switch locks used in the yards prior to petitioner's injury (R. 64, 128, 129). It is clear that no switch locks were ever provided for the use of car inspectors by either respondents, the Union Pacific Railroad Company, or the Naval authorities.

At best Roseberry's testimony falls far short of establishing any sufficient compliance with the admitted duty of furnishing proper safety devices. The switch lock, which he testified he used, was the padlock from his tool box (R. 194). There was substantial evidence that a switch could not be locked with these tool box padlocks (R. 100). Roseberry retained the key to the lock and petitioner had neither lock nor key on the day of his injury (R. 197). Roseberry never told anyone of his practice of locking the switches until after petitioner was injured (R. 197, 199, 200). He was never in the yards while petitioner was at work there (R. 194).

Kennedy, who was sent to the yards to relieve Roseberry, never used a switch lock and was never advised to do so by

Roseberry or anyone else. No switch locks were ever provided to Kennedy by his employer or the Naval Depot authorities at any time.

Neither Respondents' Nor the Navy's Rules Were Ever Promulgated, Enforced or Respected Prior to Petitioner's Injury.

From all the evidence, as above set forth in connection with blue flags and switch locks, it is clear that respondents' safety rules and regulations promulgated by them for the protection of their carmen, car inspectors and others employed in their yards generally, were never promulgated, enforced, respected or in effect in the Naval Depot yards at Clearfield.

Petitioner was never advised at any time with respect to the safety rules and regulations of the Navy. It is safe to say from the evidence that these rules and regulations were never promulgated, enforced, respected or in effect in the Clearfield yards at any time while petitioner was there employed. The Navy rule, as appears at R. 91, provides as follows: "The lead switch track on which carmen are working shall—locked with special locks; such tracks will be switched only after car inspector has given permission."

It is clear that this rule was never enforced, respected or in effect at any time prior to petitioner's injury. Switch locks were never provided for the use of Navy inspectors or respondents' inspectors, nor were they used by these men at any time prior to petitioner's injury, except as suggested by Roseberry (R. 64, 68, 91, 95, 128, 129).

The first copy of the Navy rules which Olsen ever obtained was given to him upon request after petitioner was injured (R. 92). Bingham became acquainted with the Navy rules after petitioner was injured (R. 128, 129). No claim was

ever made that any of respondents' inspectors were ever aware of the Navy rules before petitioner was injured.

It, therefore, becomes apparent that neither the Navy's nor respondents' safety rules were ever promulgated, enforced or respected within the Naval yards prior to petitioner's injury.

Herein of the Lookout Rule

It appears conclusively from the evidence that the car inspectors, while engaged in the performance of their duties, were required to depend upon their own vigilance as their only protection against the dangers of unexpected and sudden movement of the cars being inspected by the Naval switching crews. This thought was eloquently expressed by Olsen when petitioner inquired as to the protection afforded the men in the yard: "We just have to look out for ourselves, like we always have done" (R. 146). This fact was established by the testimony of all of the witnesses. See petitioner's testimony at R. 146, 155, and Olsen's testimony at R. 63, 64, 68, 70, 94, 95. "This lookout custom was followed because the men knew that under the practice in vogue there, without any blue flags or locking switches, a car might come down at any time and that the men has to take care of themselves" (R. 95).

Bingham's testimony was equally as definite. He testified that it was the uniform rule of the Navy yard at that time that it was up to the men to look after themselves (R. 137). This evidence was never contradicted or questioned by the respondents at any stage in these proceedings.

It is interesting to note that the Utah Court held as matter of law that this so-called lookout rule, which grew out of the efforts of the men to minimize the dangers and hazards of their employment and which in fact is based and founded on the instinct of self-preservation, was as matter of law

a discharge of respondents' duty to exercise reasonable care to furnish their employees a safe place to work.

To call this a safety rule is ridiculous. Looking out for themselves is just exactly what employees would naturally do without rules. If this is a safety rule then the railroad could always show a complete discharge of its admitted duty to promulgate and enforce adequate safety rules by the simple process of adopting or relying upon their employees to adopt one rule "Look out for yourselves."

Certainly the jury could well find, as it did, from this evidence, (a) that respondents sent their servant to work in a place fraught with danger, and (b) that the danger was enhanced by the fact that he was not given the protection of safety rules, regulations, methods or devices, and (c) that the injury suffered by him was proximately caused by the danger, hazards and unsafety of the work place. It thus appears that the verdict was rested upon a firm evidentiary basis and that the Supreme Court of Utah wrongfully deprived petitioner of a jury trial upon the principal issues of his case and wrongfully took from him his constitutional guarantee of trial by jury.

Specifications of Errors

1. The Supreme Court of Utah erred in vacating the jury's verdict and dismissing petitioner's cause.

2. The Supreme Court of Utah erred in holding as matter of law that the evidence was insufficient to require submission of the issue of respondents' negligence to the jury.

3. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

4. The Supreme Court of Utah wholly misconceived the legal principle upon which petitioner's action was founded and improperly and erroneously construed the facts by hold-

ing that petitioner failed to make a case for the jury for the following reasons:

(a) Proper and adequate safety rules and regulations had been adopted and promulgated.

(b) Respondents' "blue flag rule" had not been abandoned or waived.

(c) The Navy "switch lock rule" had not been abandoned or waived.

(d) Respondents were saved from liability by their own ignorance.

(e) The car inspectors "lookout practice" discharged respondents' admitted duty to promulgate and enforce safety rules, and its violation by petitioner and Olsen furnished respondents a complete shield against liability.

ARGUMENT

Point I

The Supreme Court of Utah erred in vacating the jury's verdict and dismissing petitioner's cause.

It appeared from the evidence that respondents directed petitioner, their employee, to work as a car inspector in the railroad yards of the Navy Supply Depot at Clearfield, Utah, a yard wherein many complex and dangerous switching operations were carried on by relatively inexperienced crews (R. 194). Approximately 12,000 cars were switched and handled by two large railroad companies and the Navy switching crews in these yards every thirty days (R. 35-36, 217-218). The car inspectors employed in these yards were required to work without the protection of safety rules, regulations or devices. Due to the lack of safety rules, regulations or devices the car inspectors were required to

protect themselves as best they could while working. Upon this state of the record the trial Judge denied respondents' motion for a directed verdict (R. 212, 245), and thus determined that the evidence was sufficient to require submission of the issues of negligence, proximate cause and contributory negligence to the jury. The jury found respondents guilty of negligence, which, in whole or in part, proximately caused petitioner's injury.

It becomes apparent from a consideration of the facts in this case that recent controlling and landmark decisions of this Court were ignored and disregarded by the Supreme Court of Utah.

The Utah Court held as matter of law that the conduct of respondents, as revealed by the evidence, did not show or establish a failure on their part to use and exercise reasonable care in furnishing their employee with a safe place to work.

The Utah Court in effect has held that as matter of law petitioner was solely responsible for his injury because he failed to adequately protect himself against the hazards and dangers of his work place.

The verdict of the jury was supported by substantial evidence and petitioner was clearly entitled to its benefits.

Petitioner was engaged in the performance of his required duties at a work place provided by respondents when injured. The place was dangerous and unsafe and there was a very definite causal relationship between the dangerous and unsafe condition of petitioner's work place and his injury. The court clearly erred in vacating the jury's verdict and dismissing petitioner's cause.

It is respectfully submitted that the holding of the Supreme Court of Utah is contrary to controlling decisions of this Court.

The right to trial by jury is a basic and fundamental fea-

ture of our system of federal jurisprudence. *Jacob* v. *New York City*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854.

Where there is an evidentiary basis to support a verdict the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. Only when there is a complete absence of probative facts to support a verdict for plaintiff may a court direct a verdict for defendant. *Lavender* v. *Kurn*, 66 S. Ct. 740, 90 Adv. Op. 692.

Questions of negligence under proper charge from the Court should be submitted to the jury for their determination, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444. In the above case this Court declared:

> "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury."

To deprive railroad workers of the benefits of jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury. The jury is the fact-finding body and the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

If from the evidence it appears that it would not have been unreasonable for the triers of the fact to infer that the

place of work was unsafe, a verdict for plaintiff must be sustained even though the jury might well have concluded that the place of work was entirely safe. The inferences to be drawn from uncontroverted as well as controverted facts are questions for the jury. *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598.

It is respectfully submitted that the Supreme Court of Utah in this case failed to construe and apply the Federal Employers' Liability Act in accordance with the foregoing controlling decisions; that it abdicated its duty to guard and protect the right of petitioner to a jury trial and wrongfully usurped the functions of the tribunal chosen by Congress to decide the questions of fact here presented.

Point II

The Supreme Court of Utah erred in holding as matter of law that the evidence was insufficient to require submission of the issue of respondents' negligence to the jury.

Petitioner based his case upon the charge that respondents failed in their duty to exercise reasonable care to furnish him a safe place to work in that they failed to either promulgate or enforce any safety rules or regulations for his protection while working as a car inspector. Respondents admit the duty as charged (R. 11). That respondents had said duty is clear from the authorities. This Court, in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, stated:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law. (Citing authorities.) And those federal rules have been largely fashioned from the common law (Seaboard Air Line Ry. *v.* Horton, supra) except

as Congress has written into the Act different standards. Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. —. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt, Master & Servant (2d Ed.) Sec. 917. That rule is deeply engrained in federal jurisprudence. (Citing authorities.) As stated by this Court in the Patton case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery.' 179 U. S. page 664, 21 S. Ct. page 278, 45 L. Ed. 361. It is that rule which obtains under the Employers' Liability Act. (Citing authorities.) That duty of the carrier is a 'continuing one' (Citing authorities) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

The duty of exercising reasonable care in furnishing a safe place to work is personal to the master and nondelegable. *2 Shearman & Redfield on Negligence,* Revised Edition, Sections 193 and 202. The master's duty follows the servant to whatever place he is sent by the master to perform the duties of his employment even though that place is upon property owned by another and over which the master has no control. *Porter* v. *Terminal R. Ass'n of St. Louis,* 327 Ill. App. 645, 65 NE (2d) 31; *Ryan* v. *Twin City Wholesale Grocer Co. and Minn. Transfer Ry. Co.,* 210 Minn. 21, 297 N. W. 705; *Wegman* v. *Great Northern Ry. Co.,* 189 Minn. 325, 249 N. W. 422; *Albert Miller & Co.* v. *Wilkins,* 209 Fed. 582, at page 584; *Harding* v. *Railway Transfer Co.,* 83 N. W. 395; *Steller* v. *C. & NW Ry. Co.,* 46 Wis. 497, 1 N. W. 112, 49 Wis. 609, 6 N. W. 303.

In *Porter* v. *Terminal R. Association, supra,* an action brought under the Federal Employers' Liability Act, the

employer was held responsible for the unsafe condition of the premises of a third person and over which it had no control whatsoever when its employee in the course of his employment was injured while upon said premises as a result of their unsafe condition. The appellate court of Illinois stated:

> "It is the duty of the master to furnish the servant with a reasonably safe place to work. This duty also applies to machinery and instrumentalities used by the servant in his work and this duty follows the master even though the servant is sent upon the premises of another to do his work. This duty is nondelegable and affirmative and must be continuously fulfilled and positively performed." (Citing many supporting authorities.)

The failure to promulgate or enforce proper safety rules where reasonably necessary for the protection of employees, constitutes a failure on the part of the master to discharge his nondelegable duty to exercise reasonable care to furnish a safe place to work. *Reed* v. *Davis,* 251 N. Y. S. 704, affirmed 249 N. Y. S. 929, cert. denied 285 U. S. 54, 52 S. Ct. 314, 76 L. Ed. 934.

Petitioner when injured was working in a busy railroad yard as a car inspector. In the performance of his duties it was necessary for him to work between, under and around cars standing upon tracks onto which other cars might be kicked, shoved or shifted at any time by any one of six naval switching crews. Under such circumstances it was respondents' nondelegable duty to afford and provide petitioner with the protection of safety rules duly promulgated and properly enforced.

This duty has been well expressed in *3 Labatt's Master & Servant, 2nd Edition,* Section 1125, page 2982, as follows:

> "The work of repairing a car while it is standing upon a track in a yard where switching is in progress

> is one of peculiar danger, and the courts have always held railway companies to a strict account in regard to the duty of protecting employees engaged in such work, so far as that object can be attained by proper regulations. In fact, as already mentioned, (Sec. 110, ante), one of the very earliest cases, in which the employer's duty in regard to rules was discussed, established the doctrine that it is the duty of railway companies to provide for the protection of this class of workmen by proper regulations. The general principle, therefore, is well settled, that it is the duty of a railroad company to establish regulations advising its servants engaged in moving cars on a track of the whereabouts of an employee at work in this dangerous position, and to provide adequate means of warning him of the approach of danger."

The Utah Court misconceived the force and effect of the evidence heretofore set forth in petitioner's statement of the case, and in effect held that the duty of the respondents was in fact one that might be delegated and its nonperformance excused. Is there sanction in the law for the act of the Court in permitting the respondents to place the risk of harm resulting from the lack of safety rules, regulations, practices or devices in the yards, where petitioner was required to work, upon the shoulders of their servant? If so, what then would become of the established rule that the duty of the master to exercise reasonable care to furnish his servant a safe place to work is continuous and nondelegable? As pointed out herein the only rule of conduct prevailing and followed in the yards was the practice of the inspectors based upon the fundamental instinct of self-preservation "Every man must look out for himself." There is no fundamental instinctive regard for the safety of others. The truth expressed in the age-old question still prevails, "Am I my brother's keeper?" The very reason for the requirement that safe and proper methods of work be followed,

that proper and adequate safety rules and regulations be promulgated and enforced is the universal recognition of the fact that in the enjoyment of our own security we are all prone to forget the welfare and safety of others. Blue flags properly used and respected furnish protection for men required to work between and underneath cars. Switch locks perform similar service. Likewise properly promulgated and enforced safety rules and regulations. Observance of good rules and practices saves the lives and limbs of workmen. The law requires their adoption and enforcement to the end that hazardous conditions be eliminated and safety promoted. This requirement was not complied with in the Navy yards. Petitioner was grievously injured because he was not given the protection of proper rules, regulations or safety devices. Liability is here predicated upon this violation of duty and there is no escape from the conclusion that, inasmuch as the duty which was violated to petitioner's permanent injury was absolute and nondelegable, his employers are liable.

The evidence heretofore presented furnishes ample support for the verdict; clearly demonstrates that the place where petitioner was required to work was dangerous and unsafe; that he was required to work at a hazardous occupation without the protection of safety rules and regulations or safety devices, which respondents, his employers, were duty bound to furnish.

Point III

The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

The Utah Court in determining the issue of proximate cause held that the negligence of petitioner was the sole proximate cause of his injuries.

This is another instance of a court employing contributory

negligence as a complete defense to an action arising under the Federal Employers' Liability Act contrary to the expressed terms of the Act and the controlling decisions of this Court.

The Utah Court stated:

> "Respondent seems to be the only inspector who adopted the two-man or 'lookout rule.' However, his injury on the date in question was brought about by his own violation of the very rule adopted by him. According to his best recollection that was the only time he ever went between or underneath the cars without a lookout being maintained for his protection. It does not appear that respondent was injured because any one safety rule had been abandoned. It appears, instead, that he was injured because he violated that rule which he claims to have adopted." (R. 259).

And also:

> "The fact that respondent was injured does not establish the fact that the rule adopted was not safe. Had the 'lookout' rule been complied with when respondent went between the cars, according to his own testimony, the accident would not have happened." (R. 259, 260).

And also:

> "He controlled the means by which the place could be made safe, and his own failure to properly perform his work was the only reason the place was rendered unsafe." (R. 262).

Assuming, for the moment, that petitioner and Olsen acted in violation of a "rule," it is submitted that such conduct was no more than contributory negligence. The trial court instructed the jury, as matter of law, that petitioner was guilty of contributory negligence. Petitioner has never agreed that the instruction was correct because he believes that his contributory negligence was a question of fact for

the jury. But regardless of this, his conduct could be no more than contributory negligence which is no longer a defense in an action under the Federal Employers' Liability Act, 45 U. S. C. A. Section 53.

The challenged holding on the question of proximate cause is in conflict with *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409. There, the question was whether the failure to give warning of the intended movement of an engine could be found by the jury to be the proximate cause of the death of an employee. The Court stated:

> "The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable * * * death resulting in whole or in part from negligence of any of the * * * employees."

A jury could well find that the lack of proper safety rules and regulations contributed to cause petitioner's injury. If the blue flag rule or switch lock rule had been properly promulgated and enforced, plaintiff, without doubt, would have been thereby saved from injury. Petitioner would not have been injured but for the failure of the respondents to promulgate and enforce proper safety rules for his protection. Proximate cause is ordinarily a question for the jury. *Lavender* v. *Kurn*, 66 S. Ct. 740, 90 Adv. Op. 692.

The holding is likewise contrary to that of this Court in the case of *Bailey* v. *Central Vermont Ry. Co., supra,* wherein this Court held and stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of the guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level

> ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions emphasized the appropriateness of leaving the question to the jury. * * * To withdraw such a question from the jury is to usurp its functions."

The results reached by the Utah Court on the matter of proximate cause are contrary to the holding of this Court in *Ellis* v. *Union Pacific R. R. Co., supra.*

The Utah Court evidently being in disagreement with the instruction of the lower court concerning the quality of petitioner's conduct holds that it was not contributory negligence but was, as matter of law, the sole proximate cause of his injury. This finding was employed not only to resolve and eliminate the issue of proximate cause but to relieve respondents of their nondelegable duty to furnish petitioner a safe place to work. In the very face of the plainly worded statute eliminating contributory negligence as a defense (45 U. S. C. A., Section 53), the Utah Court held that the contributory negligence of the petitioner barred recovery. They reach this erroneous result by using the simple expedient of calling contributory negligence "sole proximate cause". This court denounced this subterfuge in *Grand Trunk Western R. R. Co.* v. *Lindsay,* 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838, in the following language:

> "* * * and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendants' negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

This doctrine was reaffirmed in *Tiller* v. *Atlantic Coast*

Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444. The holding of the Utah Court on the question of proximate cause is likewise contrary to the decisions of this Court in *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683.

In determining as matter of law that petitioner's conduct was the sole proximate cause the Court entirely overlooks certain significant facts. Petitioner in the discharge of his duties was required to examine a coupler which was between two coupled cars (R. 66, 159). It was necessary for him to place his head and a portion of his body between the cars. The coupler was between the fourth and fifth cars from the north on Track No. 9. The northernmost car was about 100 feet from the switch. The lead track intersected the switch track as it proceeded through the yards from the northwest toward the southeast (Ex. "A", R. 246A). Cars on adjacent tracks obstructed petitioner's vision of the lead track (R. 169). It would take but from seven to fifteen seconds for a car traveling at a speed of from 5 to 10 miles per hour to cover the distance from the lead to the north car of the cut standing on Track No. 9. (This distance was 100 feet—R. 171). It is obvious that in the performance of his work as car inspector, petitioner could not spend all of his time keeping a lookout for moving cars, engines and other equipment. It is, therefore, apparent that at most, petitioner's conduct was contributory negligence which concurred with the negligence of the respondents in producing and causing the injury to petitioner herein complained of. *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

The negligence of respondents in failing to exercise due care to furnish petitioner a safe place to work was a definite causative factor in the cause of petitioner's injury. This

relationship was found by the jury. The finding is adequately supported by the evidence. It is submitted that the existence of liability on the part of respondents cannot be denied and should not have been eliminated by the Utah Supreme Court as matter of law.

Petitioner was penalized sufficiently for his own conduct. The jury found that he had suffered total damages in the amount of $125,275.26. Respondents have never claimed that this total assessment of damages was excessive. The jury deducted $85,000.00 from the verdict for the petitioner's contributory negligence. A further reduction would result in a most regrettable miscarriage of justice.

In its reasoning on the matter of proximate cause, the Court stated: "Even granting that the place was rendered unsafe by this violation of the 'blue flag' rule, the respondent himself had a better opportunity than the appellants to know of the increased danger. He controlled the means by which the place could be made safe and his own failure to properly perform his work was the only reason the place was rendered unsafe." This declaration emphasizes as well as illustrates the confusion of the Court in its efforts to apply the well settled principles of law to the facts here presented.

An employer can never discharge his obligation of exercising reasonable care to furnish his employee a safe place to work by informing the employee of the existence of the dangerous condition, for greater reason—the employee's right to the protection of the full performance of this nondelegable duty can never be lost by his discovery of the failure of his employer to discharge this duty. With respect to the matter of control, the holding of the Court is ridiculous. The place of work could never be reasonably safe so long as the switch crews disregarded and refused to respect the safety rules. Petitioner had no control over the switch crews. Petitioner was never in a position to either promul-

gate or enforce safety rules and regulations. All he could do was look out for himself as best he could. The only failure that can be attributed to him is that he attempted to perform his labor instead of spending all of his time in avoiding the dangers which arose from the failure on the part of respondents to exercise reasonable care to furnish him with a safe place to work. By this holding the Court, contrary to the will of Congress, has given recrudescence to the outlawed defense of contributory negligence.

Petitioner relied upon the case of *Merrill* v. *Oregon Short Line R. Co.*, 29 Utah 264, 81 P. 85, 110 Am. St. Rep. 695, as authority for the proposition that it was respondents' duty not only to promulgate, but also to enforce reasonable safety rules. While not denying the validity of this principle of law, the court exonerates respondents of responsibility for their failure to promulgate and enforce safety rules in the yards where they required their servant to work, by the following reasoning:

> "Therefore, if appellants engaged any one to see that the rules were being enforced, the only one it could have been, under the facts of this case, was the respondent himself; and it would be most unreasonable to hold that in a suit by an employee, his own negligence is the negligence of his employer" (R. 257).

This statement deserves critical scrutiny. Petitioner was employed as a car inspector and as such was entitled to the protection of reasonable safety rules properly enforced. The respondents were duty bound to provide this protection. The Court, contrary to law, has now placed upon petitioner the sole responsibility of supplying himself with the protection which his employer was duty bound to furnish.

Wikane never informed or suggested to petitioner that he was to concern himself with the promulgation or enforcement of rules. He was merely told to contact the inspectors in the yard and find out what to do. It was necessary for him to accept conditions and practices as he found them and to accept protection or danger as naturally resulted from the system prevailing at the place of employment. As matter of law he was entitled to assume that his employer knew of the conditions under which he would be required to work. He was sent there as a substitute for an inspector who had been working in the yards for more than a year. How can it be said that petitioner was solely responsible for the unsafe condition existing in the yards simply because he knew of the dangers and his employers, due to their ignorance and lack of interest, did not. The Utah Court has disregarded the well-established principle of law that the master owes a continuing duty of supervision. In *2 Shearman and Redfield on Negligence*, revised Edition, Section 214, the rule is stated as follows:

> "It is a universal American rule that the master is personally bound to maintain 'such an oversight and supervision' of his servants and business, as will enable him to discover, within a reasonable time, the incompetency or habitual negligence of any servant, the defects of any place or appliance provided for work or *the failure of his servants to conduct the business in pursuance of his rules.*
>
> "Masters, whether present or absent, have been held to personal responsibility for such general supervision as a prudent master would give if personally present. If the master chooses to delegate this supervision to an agent, or if he undertakes work on so large a scale as to leave him no choice but to so delegate it, his responsibility stands upon the same footing, in this case, as in the other duties of supervision."

Point IV

The Supreme Court of Utah wholly misconceived the legal principle upon which petitioner's action was founded and improperly and erroneously construed the facts by holding that petitioner failed to make a case for the jury for the following reasons:

(a) *Proper and adequate safety rules and regulations had been adopted and promulgated.*

The Supreme Court in commenting on the evidence declared:

> "The evidence is uncontradicted that both the appellants and the U. S. Navy did in fact promulgate and publish reasonable rules for the safety of their respective employees." (R. 257.)

The Court quoted the blue flag rule at length (R. 257). The language of that rule clearly indicates that to be effective it must be respected and observed by two distinct groups of workmen: (1) car repairmen and inspectors, and (2) switchmen. It is obvious that the car inspectors could not find protection under this rule unless it was respected and obeyed by switchmen. It is clear from the evidence that respondents' blue flag rule was never respected by the switchmen in the Navy yards. As pointed out in the statement of the case Inspector Roseberry abandoned and discontinued using blue flags after the switch crews ran over the second flag. There is no evidence in this record that respondents ever promulgated the rule or attempted to bring their own inspectors working in the Navy yards under its protection. The statement of the Court that respondents promulgated their blue flag rule for the protection and benefit of petitioner while at work in the Navy yards is not only unsupported by the evidence but is positively contrary to the undisputed facts.

The Navy rule was never promulgated, enforced or observed there prior to petitioner's injury as clearly appears from the testimony of the Navy inspectors. There is no evidence that petitioner ever received or was given a copy of the Navy rules, or that he ever knew of their existence prior to the trial. The Navy inspectors were never advised of these Navy rules until after petitioner's injury. Switch locks, the only means by which the rule could be complied with, were never furnished to the Navy inspectors, petitioner or anyone else working in these yards until after the accident.

The Court's statement and holding above referred to cannot be defended or justified upon the evidence offered and received in this case. The Court evidently entirely ignored petitioner's testimony to the effect that when he reported to the Navy inspectors for instructions pursuant to the direction of Wikane, he was told "We don't use blue flags here. They would not do any good if we did have them" (R. 146). The Court entirely overlooked the testimony of petitioner, Olsen, Bingham and Roseberry to the effect that blue flags were not used in the yards and were not respected by switch crews when it held that the respondents had promulgated reasonable safety rules. It entirely overlooked the testimony of all witnesses when it declared that the Navy had promulgated reasonable rules.

The unquestioned evidence in this case justifies petitioner in stating positively that the respondents' blue flag rule and the Navy switch lock rule were never promulgated, enforced, followed or respected by either carmen or switchmen in the Navy yards during the whole course of petitioner's employment there. No court has ever held that a master may discharge his duty to promulgate and enforce reasonable safety rules where such rules are required to make a work place safe by the mere act of publication. As

stated in *3 Labatt's Master & Servant, Second Edition,* Section 1119, page 2961:

> "The failure to bring a rule to the knowledge of the employee or employees by whose agency it is to be carried out obviously involves the same consequences, in a juridical point of view, as the entire omission to frame that rule."

It is stated in *39 C. J. 476, Master and Servant,* Section 590, as follows:

> "To relieve the master of liability for injuries to a servant resulting from the disregard of the rules adopted by him for the management of his business and the government of his servants, the servant must have had knowledge, actual or constructive, of the rules. The duty of the master as to giving notice is ordinarily performed when he has made the rules known to his servants, which rules if observed and followed by all concerned will bring such personal notice to every one entitled to it."

The error of the Utah Court in this holding is obvious.

(b) *Respondents' blue flag rule had not been abandoned or waived.*

(c) *The Navy switch lock rule had not been abandoned or waived.*

The Utah Court labored with the solution of the question as to whether or not there had been a waiver or abandonment of respondents' blue flag rule and the Navy's switch lock rule, and finally determined that no such waiver or abandonment had been established by petitioner and therefore he had to that extent failed to discharge his burden

of proof on the question of respondents' negligence. This whole question is immaterial.

As heretofore indicated in the statement of the case, neither the respondents' blue flag rule or the Navy's switch lock rule were ever promulgated, enforced, respected or in effect in the Navy yards while petitioner was employed there. It is submitted that there can be no waiver or abrogation of a rule not in existence.

Petitioner's case is based upon the well-founded charge that his place of work was rendered dangerous and unsafe by reason of the fact that no safety rules or regulations were ever promulgated or enforced, and that no safety devices were ever provided. Petitioner contended in the Supreme Court of the State of Utah, and contends here, that from the testimony a jury would be justified, if not required as matter of law, to find that the duty to promulgate and enforce safety rules was violated; that neither respondents' blue flag rule nor the Navy's "switch lock rule" were ever followed, respected or enforced at any time during the year immediately preceding his injury. The jury found favorable to the plaintiff on the issue of respondents' negligence. The matter of waiver, abandonment or abrogation of rules is of no consequence or materiality whatsoever.

Petitioner sincerely contends that the Court committed reversible and prejudicial error in considering this proposition of waiver and using it as a legal prop for their opinion wherein his right to the jury trial guaranteed him by the Constitution was defeated and denied.

The holding of the Utah Court on this matter of waiver illustrates its misapprehension of the sound legal basis upon which petitioner's case was founded. The whole point

to be resolved is, whether or not petitioner, upon the evidence produced, was entitled to have the matter of respondents' negligence submitted to the jury. If the master is required to provide the protection of proper safety rules, regulations and devices to employees while engaged in work fraught with danger, and if this duty is personal, continuing and nondelegable, how can the matter of waiver ever become of any importance in determining the master's liability for a charged failure to discharge the duty? In this case the respondents have never claimed or asserted that its blue flag rule was ever enforced or respected or in effect in the Navy yards. Even conceding the legal correctness of the Court's determination that respondent's blue flag rule and Navy switch lock rule had not been abrogated, how can such determination supply any justification for the holding that petitioner was not entitled to have the issue of respondents' negligence submitted to the jury? The violation of duty upon which petitioner predicated his cause of action is stated in Labatt's Master & Servant, Section 1120, page 2962, as follows:

> "An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business, and the guidance and control of his servants. He is also under the obligation of enforcing the rules, in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants. In other words, a master's duty does not end with prescribing rules calculated to secure the safety of employees. It is equally binding on him honestly and faithfully to require their observance."
>
> * * * * * * *
>
> "Whether the master was negligent in failing to enforce a rule adopted by it is a question of fact for the jury."

(d) *Respondents were saved from liability by their own ignorance.*

The Utah Court has permitted respondents to take safe refuge behind the shield of their own ignorance of conditions and practices which existed and were followed in the yards where they sent their servant to work. They state in effect that it was encumbent upon petitioner to show that respondents had knowledge of the habitual non-compliance with the blue flag rule and the customs followed in the yards. It appears, however, that respondents never at any time exerted any effort to discover or determine what rules, methods or practices were being followed in the yards and thus by their lack of interest, they have kept well preserved the ignorance which the Court now permits them to use as a defense. They are thus generously rewarded, at petitioner's expense, for their ignorance. By this holding the Court has permitted the master to shift the duty to promulgate and enforce safety rules and regulations and provide proper safety devices from their shoulders to the shoulders of the servant.

Did appellants have a right to assume that their rule as to the blue-flags was being enforced by the Navy? Was it not their duty to know before sending respondent to the place of work what rules were being enforced, if any, and what protection their employees had?

In speaking of the continuing and nondelegable phase of this duty, the Court in *O. & M. Ry. Co.* v. *Wangelin,* 43 Ill. App. 324, at pages 330 and 331, states:

> "* * * In such a case it is said as to civil remedy, the question is to be considered as if the master was present, saw the improper construction or use, and with such knowledge permitted the servant to use such machinery. For this reason notice to the master is unnecessary in such cases. * * * The same rule of

reasonable care with reference to proper machinery and inspection applies in the case of cars belonging to other persons which the servant is required to operate in the course of the master's business, as governs when the cars are owned and provided by the master himself."

(e) *The car inspectors' lookout practice discharged respondents' admitted duty to promulgate and enforce safety rules and its violation by petitioner and Olsen furnished respondents a complete shield against liability.*

No safety rules or regulations having been promulgated or enforced in the Navy yards, the car inspectors, as matter of necessity, were forced to look out for themselves. Such practice was born of the dangers and hazards of their employment. It is now dignified by the Utah Court to the position of a safety rule and having been designated as such it is employed to provide respondents with a complete discharge of their admitted duty to promulgate and enforce proper safety rules. On the basis of this judicial finding, the Court justifies its determination that the sole proximate cause of petitioner's injury was his failure to obey this so-called rule. The absurdity of this determination is apparent. It furnishes judicial sanction for a railroad's refusal to promulgate or enforce safety rules and regulations, it being well known that those subjected to danger in obedience to the law of self-preservation will do the best they can to "look out" for themselves. If the law were such as declared by the Utah Supreme Court, the railroads could always meet the requirement of promulgating and enforcing proper safety rules by adopting and publishing the rule "Employees must look out for themselves."

The Utah Court states that "the lookout rule was safer than the blue flag rule." What the Court really means is

that the lookout rule followed by the men was safer as far as they were concerned than a "blue flag rule" which was neither obeyed, recognized or respected by the switch crews.

The Court fails to recognize the obvious fact that petitioner was powerless to promulgate or enforce a blue flag rule or a switch lock rule in such manner as to afford safety to himself and fellow employees. Petitioner, while in the course of his employment, suffered permanent, disfiguring and crippling injury due to the dangers of his place of work. He was not responsible for these dangers; he attempted as did Olsen, Bingham and the other inspectors, to minimize the dangers by looking out for himself. This practice, born of necessity, should not be employed to rob him of the fruits of the verdict awarded by the jury.

Conclusion

If the opinion of the Supreme Court of Utah is permitted to stand, the Federal Employers' Liability Act will not afford railroad workers in Utah the same remedy and protection that it affords in other jurisdictions where the decisions of this Court are respected and followed. It will not do to say in Utah that the decisions of this Court are controlling where the interpretation and effect of the Federal Employers' Liability Act is involved, since trial courts usually follow the decisions of their immediate appellate courts. Contributory negligence is called and designated "sole proximate cause" in Utah and liability is denied as matter of law where such contributory negligence exists.

It is respectfully submitted that the opinion of the Supreme Court is in conflict with the express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act. A writ of certiorari should be granted in order for this Court to review the rec-

ord and the opinion of the Utah Court and finally reverse the same and reinstate the judgment of the trial court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 283

JOSEPH LASAGNA,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, TRUSTEES OF AND FOR THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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INDEX

SUBJECT INDEX

	Page
Petitioner's Indictment of Utah Supreme Court	2
ATEMENT OF THE CASE	4
Facts Immediately Surrounding Accident	4
Employment of Petitioner	6
Supervision and Control	9
Concerning Blue Flag Rules	11
Was Petitioner Injured While Performing His Duties?	13
RGUMENT	16
Safe Place	17
Federal Act Is Not Applicable	20
Petitioner's Violation of Rules Bars Recovery	21
Respondents Were Not Negligent and No Act or Omission By Them Was a Proximate Cause of the Accident	23
ONCLUSION	26

TABLE OF CASES CITED

rady v. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232	23, 26
urt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1	26
yram v. Illinois Central R. Co., 172 Iowa 631, 154 N. W. 1006	21
n re Chartz, 29 Nev. 110; 85 P. 352, at 357	4
avis, Agent v. Kennedy, 266 U. S. 147, 45 S. Ct. 33	21
halt v. McCarthy et al., 104 Utah 110, 138 P. (2d) 639 ..	2

Page

Ellis v. Union Pac. R. Co., 67 S. Ct. 598 ..... 17, 19

Flournoy v. Wiener, 321 U. S. 253, 64 S. Ct. 548 25

Garrison v. Davis et al., 88 Utah 358, 54 P. (2d) 439, at 444 25

Haley v. Duquette et al., 13 Colo. 427; 59 P. 227 4

Jodoin v. Lukenbach S. S. Co., 125 Ore. 634, 268 P. 51 .. 22

Keown v. Hughes et al., 265 F. 572 (1st C. C. A.) 572, at 575, 577-8 3

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 19

Lawrence v. Bartling & Dull Co., 255 Mich. 580, 238 N. W. 180, at 181 25

Missouri Pac. R. Co. v. Aeby, 275 U. S. 426, 48 S. Ct. 177 .. 18

Pauly v. McCarthy et al., 166 P. (2d) 501, 67 S. Ct. 962 ..... 2, 3

Pierson v. Chicago etc. Ry. Co., 170 F. 271 (8th C. C. A.) .. 19

Southern Ry. Co. v. Youngblood, 286 U. S. 313, 52 S. Ct. 518 22

Steel v. New York Life Ins. Co., 87 Utah 63, 48 P. (2d) 436 25

Stone v. Railroad, 35 Utah 305, at 321-2, 100 P. 362 23

Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, at 546-7 3

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; 323 U. S. 574, 65 S. Ct. 421 19

Unadilla Valley Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91 21

United States v. Ten Cases, etc., 49 F. (2d) 87 (8th C. C. A.) at 89 25

Utah Copper Company v. Industrial Commission et al., 62 Utah 33, 217 P. 1105 21

Page

Wilcox v. Cloward et al., 88 Utah 503, 56 P. (2d) 1, at (11) page 9 25

Wilson v. Valley Improvement Co., 69 W. Va. 778, 73 S. E. 64, 45 L. R. A. (N. S.) 271 17

TEXTS CITED

35 Am. Jur. 705 21

27 Ann. Cas. 1913-B, 797 17

45 L. R. A. (N. S.) 272 .....18, 20

Vol. 2 Roberts Federal Liabilities of Carriers (2d Ed.) p. 1388 20

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RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

We believe there is no conflict in the evidence pertinent to any question now before this Court or in the applicable law. We do not believe that in petitioner's Statement of the Case or elsewhere in his brief the real nature of the case and its controlling facts are presented. Perhaps his misconceptions are explained by the emotion displayed in his brief.

(Unless otherwise indicated, the italics appearing in this brief are ours.)

Petitioner's Indictment of Utah Supreme Court

Before discussing matters here at issue we consider it our duty to call attention to some of the intemperate assertions appearing in petitioner's brief. Although we do not move to strike that brief or suggest that this Court do so of its own motion, we respectfully submit that such violent assertions are wholly unwarranted and have no proper place in the records of this or any court. Among those objectionable assertions are the following:

> On page 6 of the printed petition the granting of a writ of certiorari herein is said to be essential in order to determine the construction to be given to the Federal Employers' Liability Act "and *specifically* to determine whether or not the Utah Supreme Court will be permitted *to continue to construe and apply* the Federal Employers' Liability Act in a manner contrary to the decisions" of this and other Federal courts;
>
> On page 29 of petitioner's printed brief the Utah court is unmistakably charged with wilful misconduct in "using the simple *expedient*" and adopting the "*subterfuge*" there mentioned;
>
> In the first sentence under the title "Conclusion" on page 41 of said brief, petitioner again charges in substance that the rights of "railroad workers" are not protected and "the decisions of this Court" are not "respected and followed" in Utah as in other jurisdictions.

In support of his charge on said page 6 of his petition that the Utah court habitually violates its duty to follow the decisions of this Court petitioner cites the *Ehalt* and *Pauly* cases. There is certainly nothing in the case of *Ehalt* v. *McCarthy et al.*, 104 Utah 110, 138 P. (2d) 639, which in any degree tends to support petitioner's accusation. In *Pauly* v. *McCarthy et al.*, 166 P. (2d) 501 (erroneously cited on said page 6 as in 67 S. Ct. 102 instead of 67 S. Ct. 962), there was no written opinion by this Court, and we do not see how the order there entered can be here urged in support of the pending petition. Of the scores of cases decided by the

Utah court construing and applying the Federal Act, the judgment of that court has been reversed in one case only, to wit, the *Pauly* case.

A glance at the numerous cases arising under the Federal Act where the accident occurred and the plaintiff resided outside Utah and in which counsel for petitioner represented the plaintiff and saw fit to prosecute the suit in this State, causes one to wonder why he entertains such fear that the Utah court will not give plaintiffs in such cases a square deal.

All of the five members of the Utah court concurred in the decision under attack. If they are jointly and severally as ignorant and as derelict in their duty as claimed by petitioner, it is, of course, a grave misfortune. If any one of them has ever adopted "simple expedient" or indulged in "subterfuge" in order to reach a desired end or avoid his duty to "respect and follow" the decisions of this Court or if any one of them has ever violated his obligations as a judge, such wrongful act is not reflected in any Utah decision and is known to petitioner and his counsel alone.

The extravagant charges here made by petitioner do not overcome the presumption that the five members of the Utah court are competent lawyers and honest men. It would indeed be extraordinary if each of them should misinterpret the evidence and misapply the law as grievously as petitioner would have this Court believe. An examination of the real facts and pertinent law hereinafter cited will disclose that counsel for petitioner and not the Utah court has misconceived both the law and the facts and that no valid reason exists for requesting issuance of the writ prayed for.

Among the numerous decisions condemning accusations and inferences like those here contained in the petition and supporting brief are the following:

Supreme Council of the Royal Arcanum v. *Green*, 237 U. S. 531, at 546-7;

Keown v. *Hughes et al.*, 265 F. 572 (1st C. C. A.) at 575, 577-8;

Haley v. *Duquette et al.*, 13 Colo. 427, 59 P. 227; *In re Chartz*, 29 Nev. 110, 85 P. 352, at 357.

STATEMENT OF THE CASE

Throughout the trial the attorneys and witnesses referred to The Denver and Rio Grande Western Railroad Company as "Rio Grande" or "D. & R. G." and frequently identified defendants by such names. The Navy Supply Station where the accident occurred was referred to by attorneys and witnesses under that name or as "Navy Yard", "Naval Station", "Supply Depot", etc.

Facts Immediately Surrounding Accident

Petitioner's recital of the occurrences on the occasion of his accident appears on pages 10-11 of his brief. Many of the vital facts are not mentioned by him there or elsewhere.

Petitioner's witness Carl Bingham, a Government car inspector, testified, without contradiction, that the cars that collided with the string of cars then being inspected by petitioner and Ralph E. Olsen, a Government car inspector, were cut loose and permitted to thus collide by one of the Government's switching crews in charge of a Government engine and that at the time of the collision the "cars just hit and rolled a little ways and stopped" (R. 125). Respondents, their representatives or employees, had no more relationship with said engine or crew than did any stranger.

Petitioner accompanied Olsen to the cars inspected by him on the occasion of the accident at Olsen's request (R. 158). On that day Wikane made his first trip to the Station, inspected and noted on Exhibit 5 the numbers of the string of cars standing on Track 9, and observed blood on one of them and the condition of its welded coupler which Olsen had requested petitioner to look at immediately prior to the accident (R. 208-9). The uncontradicted evidence established and it was stipulated that each of said standing cars was a Union Pacific car, that is to say, a car that was to be taken out of the Station by the Union Pacific Railroad (R. 38-41). Track

9 was used for cars to be hauled out by that railroad (R. 149). There is no evidence in the record that the condition of those cars or any inspection or repair thereof was of any concern to respondents.

Petitioner was respondents' only employee or representative in the Navy Supply Station (hereinafter called "Station") while he worked there (R. 238; 98). He and his witnesses testified that during that period, including the day of the accident, no blue flags were used but at all times, except on the occasion of the accident, the lookout rule was followed. Under a later subtitle we shall discuss the matter of blue flags.

For a better understanding of the testimony and the unusual situation which made possible the adoption of the lookout rule, we refer to the testimony of Olsen (R. 73) and Bingham (R. 111-112; 136) that they were inexperienced and were directed to accompany railroad inspectors in order to learn how to perform such work. Thus an extra man was available for keeping a lookout while cars were being inspected or repaired. Inspectors for respondents and Station inspectors never attempted to direct or instruct each other (R. 185; 204).

Petitioner's witness Bingham testified that it was the uniform rule of the Station for at least one man to always keep a lookout when anyone was in a place where he might be injured if a car was moved and that practice was always followed while he worked with petitioner (R. 137-8). Petitioner's witness Olsen testified: that it was the uniform practice for one man to keep a lookout and that when two men were together both of them would never crawl under cars because there "had to be somebody at the lookout all the time;" that on all occasions prior to the accident one man maintained such a lookout (R. 92-3). Petitioner testified: that except on the occasion of the accident or when in the area where they knew that the cars "were protected by the warehouseman and we did not have to worry about anything," a lookout in a place where he could see and give warning of any approaching car or engine was always maintained when he was in a place of danger and that the occasion of the accident was the

only instance when that practice was not followed (R. 172); there were ladders on the side of the box-car then being inspected by him and by climbing onto the car one could have seen all over the yard (R. 169); by maintaining a lookout where approaching cars or engines could be seen, any possibility of accident to him would have been avoided (R. 181); and he guesses that Olsen while standing in the clear could just as well have told him what to look at without getting in between the cars with him (R. 173).

Of course the switch on Track 9 where the cars being inspected by petitioner were standing must have been lined for that track. Petitioner says that said switch was approximately 300 or 400 feet from the cars on which he was working (R. 170) but that he "never paid any attention to switches" (R. 171). His witness Olsen said that it was no part of their duty to turn switches but that there was "nothing to prevent it" (R. 95) and that with just a little movement they could have lined that switch so that an approaching car could not have gotten on to Track 9 at all (R. 95-6).

Petitioner's witness Bingham testified (R. 139) that he had told counsel for respondents in substance that he could not "conceive of any fact or reason of any kind or character that would connect the Denver & Rio Grande Western Railroad Company up with the happening of this accident to Mr. Lasagna" and further testified (R. 140-141) that it was too deep for him to figure out how anything done or omitted by the D. & R. G. could have been the cause of the accident.

Employment of Petitioner

Petitioner sought recovery in this suit under the Federal Employers' Liability Act and not otherwise. The allegations contained in paragraphs 4 and 5 of his complaint are the allegations upon which his right to sue under that Act must rest. Said paragraph 4 reads as follows:

> 4. That on or about July 25, 1944, and for several months prior thereto, plaintiff was in the employ of defendants, the said trustees, as an inspector to inspect and repair railroad cars *which were used, oper-*

> *ated and controlled by them* in carrying on *their* said interstate commerce business, and that the said plaintiff, so employed by them in making *such* inspections and repairs, likewise was engaged in interstate commerce (R. 2).

In said paragraph 5, immediately following the above quoted language and definitely tied to it (R. 2), petitioner alleges: "That in the course of *said* employment of the said plaintiff and in making *such inspections and repairs*, it then and there became, and it was, the duty of the said defendants to furnish and provide plaintiff a reasonably safe place in which to make *such inspections and repairs*," and to promulgate and enforce rules and regulations "by requiring flag warnings or other warning signals" for the protection of petitioner and other employees of respondents, but that respondents failed to perform those duties.

It will be observed that allegations in subsequent paragraphs of the complaint that petitioner at times inspected Union Pacific cars and worked with Union Pacific and Naval Station inspectors are merely allegations of a *practice* and do not amend or modify said allegations of paragraphs 4 and 5, which clearly and unmistakably define and limit the nature and scope of petitioner's employment.

On page 9 of the brief of petitioner, following his recital of the allegations of the complaint with respect to the duty of respondents to furnish him with a safe place of work and to promulgate and enforce proper rules, appears an utterly erroneous statement of alleged admissions of those recitals in respondents' answer. A reading of paragraph 3 of the answer at the page cited by petitioner (R. 11) will disclose that respondents there merely admit, as they freely admit here, that when (as alleged in paragraph 5 of the complaint (R. 2) to which said paragraph 3 of the answer was directed) switching operations are carried on by respondents "in yards or other places maintained or controlled" by them they owe employees there at work the duty of furnishing a reasonably safe place of work and also the duty of establishing, promulgating and exercising due care for the enforcement of proper

rules. All allegations of the complaint not expressly admitted are denied in paragraph 7 of the answer (R. 13).

In their answer (R. 10) respondents admit said allegation that petitioner was employed by them "as an inspector to inspect and repair railroad cars which were used, operated and controlled by them in carrying on their said interstate commerce business" and that *while thus working* he and respondents were engaged in interstate commerce, but deny (R. 13, paragraph 7) any allegation that when he met with his accident he was performing work for respondents or that they were guilty of any claimed negligence.

Car foreman Ellis V. Carlson, called as a witness by petitioner, testified without contradiction that after the Station began operations in June, 1943, until the year 1945, Roseberry was car inspector for respondents at the Station except during brief periods when he was relieved by Kennedy and petitioner, respectively (R. 46). He further testified (R. 48) that said inspectors were not to inspect and repair any cars that were not to be moved by respondents.

As stated on page 8 of petitioner's brief, he was a first class carman, with seventeen years of experience when he began work at the Station. The duties of that job consisted of inspecting and repairing cars (R. 159). His first employment at the Station was for approximately one month, beginning on March 13, 1944 (R. 143). His other employment there began on July 20, 1944, and with the exception of July 22 he continued to work there until his accident on July 25, 1944 (R. 156-7). *The only occasion when he had any conversation with and received directions from respondents or any officer, agent or employee of respondents concerning the Station and the work to be there performed by him* was that referred to on page 12 of his brief. At the pages there indicated (R. 143-4) he says that Assistant Car Foreman Wikane then told him that he (Wikane) had never been in the Station, that a U. P. and Navy man were working there, to ask them "what there is to do" and "they would show me." Wikane says (R. 206) that what he then said was that petitioner "would be told when he arrived there what tracks were designated for receiving and delivering Rio Grande cars."

If there is any real difference between petitioner's and Wikane's versions of this conversation, it was of course the sole province of the jury to decide which was correct. But nothing was there said and nothing appears elsewhere in the record either expressly or impliedly indicating that this experienced carman, who thoroughly knew his business and required no instruction (R. 206), was authorized, directed or permitted by respondents to violate rules promulgated by them for his protection and well known to him or to otherwise evade the responsibilities of his vocation.

Petitioner's testimony (R. 144-5) makes clear his full knowledge of the difficulties incident to gaining entrance to the Station and the fact that it was under military control. That testimony, including Wikane's statement to petitioner that he had never been in the Station and had no knowledge concerning it, refutes any possible assumption by petitioner that Wikane or the Trustees had any knowledge or were proferring any assurances with respect to the Station or operations there conducted. Except in his complaint petitioner has never claimed that he indulged in any such assumption. The uncontradicted evidence hereinafter cited establishes that at all times while petitioner was employed at the Station he had full notice and actual knowledge concerning all operations, practices and conditions therein which in any manner related to his work or contributed to his accident and that respondents, their officers, agents or employees or any of them other than petitioner had no notice or knowledge thereof. *With such complete information and well knowing that he was the only representative of respondents on the ground, petitioner elected to remain silent.*

Supervision and Control

As alleged in the complaint (R. 2-3) and admitted in the answer (R. 12), said Station was built and operated by the Federal Government. Within the Station the Government maintained and operated an extensive railroad yard, with tracks indicated on plaintiff's (petitioner's) Exhibit A, a copy of which appears following page 246 of the printed record. Respondents had no supervision or control or right

of supervision or control over the Government's engines, switching crews or other employees in the Station or over the tracks, structures, or other property there maintained by the Government. As alleged in paragraph 7 (R. 3-4) and paragraph 9 (R. 5) of the complaint and established as matter of law by uncontradicted testimony and the admissions in paragraphs 4 and 5 of the answer (R. 12-13), petitioner was employed and paid by respondents, was not subject to the direction, order, control or management of anyone else, and respondents had no direction, control or supervision over any employee of the Government or of the Union Pacific Railroad Company.

Petitioner's witness Carl Bingham, employed by the Government as a car inspector (R. 112), testified without contradiction (R. 138): that the Station was enclosed by a fence eight or nine feet high, inside which was a highway patrolled by armed guards, whose duty it was to see that no one entered without proper credentials, and even if his credentials were accepted and he was permitted to enter, he would be accompanied by an armed guard during all of the time he remained inside. Petitioner's witness Ralph E. Olsen, also employed as a car inspector by the Government (R. 49), testified without contradiction: that the Station was under strict Army discipline and, so far as he observed, that dicipline was never relaxed; that anybody outside, even the Governor of the State or the General Superintendent of respondents or of the Union Pacific Railroad Company could not have gained entrance to the enclosure surrounding the Station without showing their credentials and obtaining permission to enter (R. 99); and that to his knowledge the only people in the world who had any control, supervision or power of control or supervision over operations in the Station, including switching operations, were the Government officers in charge (R. 98).

The first paragraph of the trial court's instruction to the jury No. 6 was as follows:

> "You are instructed that no evidence has been introduced in this case sufficient to sustain or justify a finding by you that defendants had any power or

> authority to supervise, direct or control any engine, switching crew or employee of the Government Agency operating the Navy Yard or to make or enforce any rules or regulations or to control or change any practices of any employee or employees of the Government Agency in charge of the Navy yard" (R. 18).

Since petitioner filed no cross-assignment of error in the Utah Supreme Court directed to the above quoted instruction, it would not be subject to attack even had its accuracy not been conclusively established by the uncontradicted evidence, including that above cited.

Concerning Blue Flag Rules

At page 9 of his brief, petitioner identifies the negligence upon which he relies as a failure of respondents "to use and exercise reasonable care in furnishing him with a safe place to work, in that they commanded him to perform the duties of his employment as car inspector in yards where the inspectors were not protected by safety rules, regulations or devices."

Since there is not a scintilla of evidence in the record suggesting the existence of any defect or unsafe condition of the Station premises or of any tracks, buildings or other property located thereon or of any tools, machinery, equipment or other thing furnished to or used by petitioner, we do not see how the doctrine of "safe place" could be here involved. In our Argument we shall again make brief reference to this matter.

In charging negligence with respect to safety rules, the only rules specifically mentioned in the complaint are "flag warnings or other warning signals to be attached to or placed on cars" (R. 2). When Circular No. 100 was promulgated, petitioner received and acknowledged in writing his receipt of it (R. 161). When a copy of respondents' safety rules was shown to petitioner, containing Rule 26, he said (R. 162), "I know what is in it. I don't have to read this." Both said circular marked Exhibit 3 (R. 247-8) and said Rule 26 (R.

126) were received in evidence without objection (R. 126). By those rules inspectors and other employees working in, on, under or about an engine, car or train are required to protect themselves against movement of such equipment by displaying blue signals as therein specified. Petitioner testified that he was thoroughly familiar with those rules (R. 160) and that when inspecting or repairing cars on the D. & R. G. lines he would uniformly get a blue signal and protect himself in that way (R. 163) and knew that it was up to him to thus protect himself (R. 164). He further testified (R. 166; 177) that he did not ask for blue flags but just went and got them when he needed them. His only explanation of why he did not procure a blue flag when working at the Station was that he didn't think he could bring anything with him through the gate to the Station, that he "never bothered", and did not try or make any effort to bring in a blue flag and use it (R. 167).

No evidence was introduced which proved or tended to prove that either of said rules had ever been abrogated or that respondents ever had any notice or knowledge that they were not being obeyed by petitioner.

None of the three men employed by respondents to work in the Station was ever there while either of the other two was there. As already indicated, petitioner or Kennedy only went there to perform Roseberry's work as carman while he was off duty. Petitioner testified that during his employment in the station he never saw Roseberry (R. 156) and that he (petitioner) was "the only Rio Grande man out there" (R. 238).

Neither the evidence nor petitioner's brief contains any suggestion as to what could have been done by respondents with respect to their blue flag rules that was not done. Those rules have never been abrogated. At the pages above cited petitioner himself testified that they were duly promulgated, well known to him, and during the years of his service as carman for respondents had been uniformly obeyed by him. If it was respendents' duty to gain access to the Station premises and learn whether or not their blue flag rules were

being enforced, what representative more competent than petitioner could have been selected for that purpose? His unusual qualifications are stressed in his brief and established by the uncontradicted evidence. Were respondents negligent in failing to employ one or more additional men to shadow petitioner, learn whether or not he was obeying the rules, and file a report of their investigations? Pursuant to what principle of justice, law or logic could petitioner fail to notify respondents concerning any hazardous practices or conditions unknown to them but fully known and appreciated by him, their sole representative on the ground, and then complain because they did not correct those conditions? If they did not have the right to look to him for such information, including notice of his failure to follow their blue flag rules, to what source was it their duty to look? With respect to the alleged waiver of the blue flag rules, the Utah court aptly says (R. 265):

> "It would be strange, indeed, to hold that the master was liable because the servant had himself violated a rule, and that therefore the master had waived it."

Was Petitioner Injured While Performing His Duties?

At page 8 of his brief petitioner says that he "was injured in the performance of his duties under his employment." Were it not for the statements of the Utah court next below cited, we would not hesitate to say that the record discloses nothing in support of a claim that petitioner was acting within the scope of his employment when injured. In its opinion (R. 253) that court says that although "normally" cars to be taken out by Union Pacific were placed on Tracks 9 and 10, "there were exceptions to this rule, and according to respondent's (petitioner's) testimony he had no knowledge as to the destination of the cars *since this was a military secret.*" Later referring to respondents' contention that petitioner was outside the scope of his employment when injured, the Utah court says: "The facts and circumstances shown by the record indicate otherwise. *However, it is not believed a discussion of this point is necessary to a proper solution of the case.*"

It is true that petitioner and his witnesses testified that at times errors were made in switching operations and cars that were not to be taken out by Union Pacific were placed on Tracks 9 or 10 assigned to that railroad instead of on Tracks 11 and 12 assigned to respondents. It is also true that in answer to one question petitioner said that the destination of cars "was a military secret." If petitioner had been generally employed to inspect and repair cars in the Station with no means of knowing which of them were to be handled by his employers and which by Union Pacific, he could not be censored for being unable to tell them apart and would not be outside the scope of his employment in inspecting or repairing any cars he found there. But regardless of whether the "destination" of cars in the Station was a military secret, the matter of which railroad was to haul them from the Station and would be responsible for their condition was not a military or other kind of secret. It was a fact necessarily made known to each railroad before transportation from the Station began.

Olsen says (R. 80) that if petitioner was there on the job when Rio Grande trains came into the Station, petitioner would inspect those trains. Petitioner testified (R. 237-8) that he was required to wait around for incoming Rio Grande cars and if he had to wait an hour and a half for an incoming Rio Grande train after his eight hour shift, he would charge overtime for that waiting period. Manifestly there could have been no uncertainty in his mind as to the identity of the incoming cars that it was his duty as carman to inspect and repair.

With respect to cars that were to be taken out of the Station, petitioner testified (R. 242): that the train control office in the Station had a list of all cars and where they were to go and who had to take them out; that after he had inspected a car he would then go to the train control office and learn whether it was to be taken out by Union Pacific or respondents. Similiar testimony appears on other pages of the record, including his statement (R. 230) that he would know what cars were to be handled by respondents if they were on Tracks 11 and 12 or if he was so informed by the train control office. That information was as readily available to

him before as after he inspected or repaired cars. *He gave no reason for or explanation of his failure to learn from the train control office, before inspecting or repairing cars, the identity of those for which respondents would be responsible.*

Petitioner and his witnesses testified that they all worked together in the Station. Olsen's testimony (R. 108-110) indicates that their sole reason for doing so was a friendly and wholly voluntary co-operation between them and a thought that they might thus facilitate the work. *There is not a scintilla of evidence in the record that knowledge or notice of such practice was ever communicated to respondents.*

If petitioner's version of his conversation with Wikane when he began work at the Station is fully accepted, we respectfully submit that he had no right to assume or act on the assumption that he was to work for Union Pacific or inspect or repair any cars except those of concern to his employers. For years he had been a D. & R. G. carman and he knew that he was going to the Station to relieve another D. & R. G. carman. He had no more right to assume that it would be his duty to inspect and repair Union Pacific cars than to cook or wash dishes for the Government.

Manifestly Wikane had no express or implied authority to consummate what would have been in substance and effect a joint terminal agreement between the railroads. If he had authority to employ petitioner to inspect and repair Union Pacific cars, the results of such employment might be very far-reaching and involve vast liabilities to Union Pacific, its employees, and others who might suffer damage if petitioner should be negligent in his work. Wikane testified without contradiction (R. 207-8): that such operations have never been entered into by railroads without carefully drawn contracts allocating costs of both material and labor and safeguarding the rights of the parties; that the Superintendent of the railroad would have no right or authority to enter into any such arrangement, and no such contract could be consummated without the approval of the Federal Judge before whom the bankruptcy proceedings were then pending.

We respectfully submit that petitioner's work cards, in his own handwriting and introduced in evidence as Exhibit

No. 6, conclusively prove that he knew that he was not performing any service for which he was employed while inspecting or repairing cars for Union Pacific. He testified: that it was his duty to prepare and file a card showing his work on each day and that he performed that duty (R. 217); that he endeavored to report faithfully each day's work on the cards included in said Exhibit 6 (R. 218); that every one of the cars designated on Exhibit 6 and on the carbon copies of those cards produced by him and marked Exhibit 7 was a car handled by D. & R. G. (R. 221); that he did not make any report on any work he did for Union Pacific because he knew it was none of the business of and of no concern to respondents, and he made no report of his work to Union Pacific because he was not working for that company (R. 223). It is uncontradicted that petitioner's work cards furnished the sole information on which his compensation was computed, that respondents had no means of checking their accuracy, and had they received any notice or knowledge that any part of the time for which petitioner was charging had been employed in other work than the repair and inspection of D. & R. G. cars, compensation would have been confined to the time spent on D. & R. G. work and the performance of any work by petitioner for Union Pacific or for anyone except respondents would have been stopped. (See Wikane's testimony, R. 243-4, and petitioner's at R. 238 and other pages earlier cited herein.)

Confessedly petitioner while inspecting or repairing Union Pacific cars was not engaged in inspecting or repairing respondents' "railroad cars which were used, operated and controlled by them in carrying on their said interstate commerce business" as alleged in paragraphs 4 and 5 of his complaint earlier discussed in this brief.

ARGUMENT

It seems to us that petitioner has been excessively prolific in his citation of authorities announcing the elementary law: (a) that a valid judgment entered on a verdict "supported by substantial evidence" should not be reversed and the suit

dismissed by an appellate court; (b) that it is the province of the jury to pass on conflicting evidence as to material facts; and (c) that in cases arising under the Federal Employers Liability Act, State courts have no right to construe and apply that Act "in a manner contrary to the decisions of the United States Supreme Court." If any authority in support of any one of said propositions were required, a single citation would certainly have sufficed and a substantial amount of printing would thereby have been saved.

Although we believe our reference to the grave error of petitioner on page 9 of his brief with respect to admissions contained in respondents' answer and our recital of the controlling facts of the case make unnecessary any further argument or any citation of authority by us, we shall briefly discuss some of petitioner's contentions.

Safe Place

On page 37 of the brief filed by him in the Utah Supreme Court, petitioner cited in support of his contentions relative to "safe place" the annotation in 27 Ann. Cas. 1913-B, 797, to the case of *Wilson* v. *Valley Improvement Company*, 69 W. Va. 778, 73 S. E. 64, and there also cited the report of said case in 45 L. R. A. (N. S.) 271. In the first paragraph of said annotation the editor says that the rule requiring the employer to provide his employee with safe appliances and a reasonably safe place to work "is based on the possession, use and control by the master of the appliances used and the premises where the servant's work is performed, and is not ordinarily applicable to cases where the appliances used or the premises where the employee's services are performed are owned and controlled by a third person." So far as we are aware the statement of the general rule just quoted is well-settled law in all jurisdictions.

Ellis v. *Union Pac. R. Co.*, 67 S. Ct. 598, is an apt illustration of an exception to this general rule. There the plaintiff was injured when caught and pinned against the wall of a building adjacent to the railroad track along which the car he was riding was traveling. There was a curve in the track

which made the situation "deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially." Plaintiff was "unfamiliar with the area and its hazards." There was a warning sign but he did not see it and "no effort was made to warn him personally," although the engineer on the train "was an experienced railroad worker thoroughly familiar with this particular spur" and rested under the duty to watch plaintiff "continuously or stop the engine." The railroad company did not build, maintain or have control over the adjacent building, but this Court held the matter of negligence in failing to warn to be a question of fact for the jury.

In said 45 L. R. A. (N. S.) cited by petitioner in the Utah court, the editor says at page 272:

> "Of course, it could not be contended that the master would be liable for injuries to his servants caused by the sporadic negligence of servants of a third person upon other premises."

The only possible exception to the last quoted statement of well-settled law would be where the employer had notice of dangerous operations or practices and failed to warn the employee. When the complaint herein was drafted, petitioner's able counsel fully recognized the law to be as just quoted. This is evidenced by the allegations of the complaint (R. 5-6) that respondents had full notice and knowledge of the alleged unsafe condition of petitioner's place of work and of the alleged negligent practices there followed, that they failed to warn petitioner of said dangers, and that petitioner "had neither notice nor any knowledge whatever, until after the happening of the accident as hereinafter alleged, nor any knowledge of the conditions and circumstances of any unsafe condition of the premises." *There was a complete failure of proof of any of the allegations just referred to, and, as hereinbefore indicated, the uncontradicted evidence establishes that petitioner had full knowledge concerning conditions and practices in the station and remained silent.*

In *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426, 48 S. Ct. 177, where plaintiff brought suit under the Federal Act, the

court at page 179 of the Supreme Court Reporter thus disposes of her contention that she should have been warned of an alleged dangerous condition:

> "Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning."

We respectfully submit that cases like the *Ellis* case, *supra*, or *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, where there was substantial evidence that the intestate was killed when struck by a mail hook negligently permitted to protrude from the train, or the *Tiller* decisions, 318 U. S. 54, 63 S. Ct. 444; 323 U. S. 574, 65 S. Ct. 421, where the jury found on evidence held to be substantial that the death of the intestate was occasioned by defendant's violation of its duty to warn, have no more pertinency in the case at bar than decisions construing the income tax law. As conclusively appears from our review of the pleadings and evidence, *supra*, petitioner was respondents' only representative at the Station. He had actual knowledge of all conditions and practices there and respondents had none. They cannot be charged with negligence for failure to warn him of something they knew nothing about and concerning which he had full and exclusive information.

Not a single case cited by petitioner is remotely in point here. A sufficient answer to all of his cases dealing with the doctrine of "safe place" would be that such doctrine is not involved here.

In *Pierson* v. *Chicago etc. Ry. Co.*, 170 F. 271 (8th C. C. A.), plaintiff had been employed by defendant as a boiler maker's helper and worked in a roundhouse on defendant's own premises to which an addition was being built by an independent contractor. As plaintiff in the course of his employment was entering defendant's roundhouse where he was employed, a brick was swept from the roof by an employee of the independent contractor engaged in constructing the addition, which brick struck plaintiff and occasioned the injuries complained of. In denying liability the court quotes with full

approval various excerpts from decided cases and Thompson on Negligence. In harmony with the editor's statement in 45 L. R. A. (N. S.) 272 above quoted, the court says at page 275:

> "Here the place furnished the plaintiff for the performance of his work was in itself no way dangerous, and the defendant had no occasion to anticipate that the servants of the contractor, over whom it had no control whatever, would sweep bricks from the roof and thereby cause injury to the plaintiff.
>
> "The conclusion reached is that the record fails to show actionable negligence, or any negligence, upon the part of the defendant, and the judgment of the Circuit Court is affirmed."

If any negligence other than petitioner's was a proximate cause of his injuries, such other negligence could only have been "the sporadic negligence of servants of a third person upon other premises." We respectfully submit that petitioner's witness Bingham, who saw the accident, cannot be charged with mental incompetence for saying that it was too deep for him to figure out how anything done or omitted by respondents could have been the cause of the accident.

Federal Act Is Not Applicable

Two conditions precedent are essential to a holding that petitioner was acting within the scope of his employment when injured: (1) that Assistant Car Foreman Wikane had authority to hire petitioner to inspect and repair Union Pacific cars, thus initiating a joint operation without the knowledge or consent of respondents *and without the knowledge or consent of Union Pacific;* and (2) that what petitioner testified Wikane told him was a direction or could properly be construed by petitioner as a direction to do such work for Union Pacific if whoever he happened to meet at the Station should tell him to do so.

In Vol. 2 of Roberts Federal Liabilities of Carriers (2d Ed.), at page 1388, the author states that "it is an essential prerequisite to liability" of the employer under the Federal

Act that the employee be acting within the scope of his employment when injured. Among the numerous cases cited by Mr. Roberts in support of his text is *Byram* v. *Illinois Central R. Co.*, 172 Iowa 631, 154 N. W. 1006, where suit was brought under the Federal Act. At page 1008 of 154 N. W. the Iowa court says that to come within the Act plaintiff must have received his injuries "while in the course of his employment. If he voluntarily undertakes the performance of a duty for which he was not employed, he acts at his own peril, and does not come within the terms of the act." We have found no decision at variance with this statement of the law. We know of no workmen's compensation act that would impose liability *on respondents* under facts like those in the case at bar. In this connection the decision of the Utah court in *Utah Copper Company* v. *Industrial Commission et al.*, 62 Utah 33, 217 P. 1105, is pertinent.

Petitioner's Violation of Rules Bars Recovery

In 35 Am. Jur., after saying that recovery by an employee may not be barred where he fails to follow a safety rule in obedience to an order of a superior having authority to make such order, the editor adds at page 705:

> "* * * of course, it must be made to appear that authority to waive observance of the rule was vested in the person whose order the employee obeyed."

Since nothing was ever said to petitioner by Wikane or any other representative of respondents intimating that the blue flag rules should not be followed, no question of "waiver" is here presented. Certainly petitioner had no right or authority to waive or otherwise abrogate them. Among the many decisions of this Court holding that it was his personal duty to obey safety rules and that his violation of those rules absolutely bars recovery here are the following:

> *Davis, Agent* v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33;
>
> *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 49 S. Ct. 91;

Southern Ry. Co. v. *Youngblood*, 286 U. S. 313, 52 S. Ct. 518.

The only possible reason for typing or printing a rule is to impart notice and knowledge to employees affected thereby of the identity and nature of safety practices under which they will work. If they otherwise become informed of those practices, it adds nothing to type or print them on a sheet of paper. We know of no decision contrary to that of the Oregon court in *Jodoin* v. *Luckenbach S. S. Co.*, 125 Ore. 634, 268 P. 51, and cases there cited, wherein it is held "that it is unnecessary to post, promulgate, or otherwise announce a rule or regulation to be effective, if it is understood and observed by the persons to whom it applies so as to have become a custom."

When petitioner sets forth on said page 9 of his brief the negligence of respondents upon which he relies, he designates it as a failure to furnish him "with a safe place to work, *in that* they commanded him to perform the duties of his employment" without safety rules, regulations or devices. Thus he unwittingly makes clear the indisputable fact that the character or condition of the premises, tools or other equipment had nothing to do with his accident and that the doctrine of "safe place" and his numerous citations involving that doctrine are not pertinent here. By compulsion he resorts to his contention with respect to safety rules, and his whole case is there rested. On page 14 of his brief he says: "The enforcement of the blue flag rule would undoubtedly have saved petitioner from injury." Who except himself could have accomplished that salvation? What agent or representative of respondent, other than himself, had opportunity to follow or enforce the lookout rule?

There is no evidence as to what if anything respondents would have said or done had petitioner informed them that he was not using blue flags as required under their rules but was following the lookout rule. However, it is obvious that the lookout rule is a much safer rule. A comparatively small blue flag may be and often is not seen by the crew of approaching cars or engines, whereas a lookout watching for approaching cars or engines could not well fail to see objects of that size. Nothing in the record indicates that the lookout rule did not

meet all requirements of due care. Petitioner's testimony that had it been obeyed any possibility of accident would have been avoided is ample proof of its sufficiency. The fact that Olsen and Bingham were in the habit of following petitioner around in order to learn the business, thus having an extra man who could keep watch, is doubtless responsible for the adoption of the lookout rule. We know of no other railroad yard in the United States where such a situation existed or where any rule was or is generally followed affording as much protection to carmen working in or under cars as did the lookout rule when obeyed. In this connection we invite attention to *Stone* v. *Railroad*, 35 Utah 305, at 321-2; 100 P. 362. Had petitioner seen fit to inform respondents of the practice he was following, even were it assumed that they had power to dictate to the Government what practices should be employed it is probable that they would have given their full approval to substitution of the lookout rule for their blue flag rules.

By his voluntary act in going between the cars when he knew that no lookout was being maintained as required under the lookout rule theretofore uniformly obeyed by him and when, as he testified, all possibility of accident would have been avoided had such lookout been maintained, petitioner forfeited any right of recovery under any law ever announced by this or any court. On page 14 of his brief he says that compliance with the blue flag rule would have prevented the accident. His admitted violation of that rule is also a complete bar to any right of recovery by him.

Respondents Were Not Negligent and No Act or Omission By Them Was a Proximate Cause of the Accident

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, this Court says at the Supreme Court Reporter pages below indicated:

> "* * * The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. (Cases cited.) When the evidence is such that without

weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (p. 234.)

"* * * The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. (p. 236.)

"* * * Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. (p. 236.)

"* * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events." (pp. 236-7.)

We have already quoted Instruction No. 6 (R. 18) given by the trial court, wherein the jury was charged as matter of law that no evidence was introduced sufficient to sustain or justify a finding by them that respondents had any power or authority to supervise, direct or control any engine, switching crew, or employee of the Government, or to make or enforce any rules or regulations or control or change any practices in the Station of any employee or employees of the Government. Entirely aside from the fact that said instruction is a plain statement of the truth as conclusively appears from the record, its accuracy cannot be now questioned. Petitioner did not assign in the Utah Supreme Court any cross-error complaining of this instruction. That court has unquestioned power to establish rules of practice and procedure to be there followed. Among the later cases announcing its well-settled rule that action in the trial court will not be reviewed unless assigned as error and that a respondent cannot attack a ruling of the trial court without assigning a cross-error directed to that ruling, are the following:

Wilcox v. *Cloward et al.*, 88 Utah 503, 56 P. (2d) at (11) page 9;

Garrison v. *Davis et al.*, 88 Utah 358, 54 P. (2d) 439, at 444;

Steele v. *New York Life Ins. Co.*, 87 Utah 63, 48 P. (2d) 436.

Said rule of practice in the Utah court is grounded upon the same considerations that induced the rule in Federal courts which forbids attack by appellee on rulings of the lower court in the absence of a cross-appeal.

See: *United States* v. *Ten Cases, etc.*, 49 F. (2d) 87 (8th C. C. A.), at page 89, and numerous decisions of other Circuit Courts of Appeal and of the United States Supreme Court there cited.

Flourney v. *Wiener*, 321 U. S. 253, 64 S. Ct. 548.

Surely respondents cannot be guilty of negligence for failing to do what they had "no power or authority" to do. But were the absurd assumption indulged that they were more powerful than the United States Government and could have gained entrance to the Station and compelled the Navy officers there in charge to do their bidding, any obligation to attempt such feat could not arise before they were apprised of its necessity. Until their sole representative on the ground, to wit, petitioner, saw fit to convey to them his knowledge concerning conditions or practices in the Station, they had the right to presume that he and other persons working there were performing their duty and exercising due care.

See *Lawrence* v. *Bartling & Dull Co.*, 255 Mich. 580, 238 N. W. 180, at 181.

During the period in question the late war was on. It is alleged in paragraph 7 of the complaint (R. 3) that respondends rested under the duty "to inspect engines and cars" in the Station and see that they were in proper condition to transport war munitions, etc. The allegation of such duty negatives any inference that its performance constituted negligence. A

failure or refusal to perform that duty in wartime would have been not only wrongful but fraught with serious consequences to them. In employing petitioner as their carman at the Station, they had the right to presume that he would not be exposed to danger arising from negligence or other wrongful act of the Government or its employees. They were not negligent in failing to anticipate any of the occurrences incident to the accident, including the conduct of Olsen and the Government's switching crew or the gross negligence of petitioner himself.

In *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, Mr. Justice Holmes, at page 6 of the Northeastern report, thus states what we contend to be elementary law:

> "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual."

Even if the utterly false assumption could be indulged that something in the record indicates that Wikane was negligent in March, 1944, when the only conversation concerning petitioner's work at the Station occurred, that negligence was completely insulated long prior to the happening of the accident; it was certainly not "a link in an unbroken chain of reasonably foreseeable events" as required by the decision of this Court in the *Brady* case, *supra.*

We believe the opinion of the Utah court (R. 252-266) touching the subject-matter of this subtitle is unanswerable and shall not lengthen this brief by quoting that court's observations and conclusions.

CONCLUSION

Manifestly the Utah court did not here decide "*a federal question of substance*" contrary to any applicable decisions of this Court and there are not "special and important reasons" for issuing the writ prayed for, as required under Rule 5, 5(a)

of this Court. If this Court will review decisions of State courts in suits brought under the Federal Employers' Liability Act merely because of claimed errors of the type here assigned, aggrieved plaintiffs and defendants in such cases will occupy the entire time and attention of this Court.

It seems to us clear that *legal* responsibility for this accident does not rest on respondents or on Union Pacific, whose cars petitioner was inspecting. We doubt that the Government, whose employee requested petitioner to perform that work and whose switching crew and car inspector were actors in the occurrences which occasioned the accident, is *legally* responsible. If there is any *moral* responsibility, it clearly rests on the United States Government. Application for relief should be addressed to Congress and not to the courts.

We earnestly contend that the writ prayed for should not be issued.

Respectfully submitted,

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